APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-1976

RICHARD F. KLONOSKI, M.D., *et al.*,
Plaintiffs, Appellants,

v.

BENJAMIN MAHLAB, M.D., *et al.*,
Defendants, Appellees.

Appeal From the United States District Court
for the District of New Hampshire
[Hon. Steven J. McAuliffe, *U.S. District Judge*]

Before

Torruella, *Chief Judge*,
Bownes, *Senior Circuit Judge*,
and Stahl, *Circuit Judge*.

September 23, 1998

BOWNES, *Senior Circuit Judge*. This is an appeal from a jury verdict of no liability in a medical malpractice case. Plaintiff-appellant is Richard K. Klonoski, M.D.,

who brought suit on his own behalf for loss of consortium, as administrator of the estate of his wife Jolanta, and on behalf of their three children.[1] Defendants-appellees are Benjamin Mahlab, M.D., Mary Hitchcock Memorial Hospital, Inc., and Hitchcock Clinic, Inc.

We address only one of the three issues raised by appellant because it is dispositive. On the thirteenth day of trial during cross-examination of Dr. Klonoski, the last witness in plaintiff's case, defendants disclosed for the first time and used letters written by Mrs. Klonoski to her sister in Poland. Excerpts from the letters were allowed in evidence. Neither Dr. Klonoski nor his attorneys knew of the existence of the letters prior to this time, despite a court order requiring disclosure of such information prior to trial. We find that this constituted trial by ambush. We vacate the judgment below and remand for a new trial.

I.

BACKGROUND

Jolanta Klonoski and her husband, Dr. Klonoski, were the parents of two children: Brian, born in Poland, and Karina, born in the United States. Dr. Klonoski was born and raised in Connecticut. He received his medical training in Poland where he met and married his wife. After he finished his medical training, he, and his wife, and their son, Brian, moved to the United States. Mr. Klonoski became pregnant with their third child in September or October of 1992. At that time Dr. Klonoski was employed by Mary Hitchcock Memorial Hospital as a cardiologist. On Saturday, May 8, 1993, at approximately 11:15 a.m., Mrs. Klonoski went to the Birthing Pavilion of the Dartmouth-Hitchcock Medical Center because of vaginal spotting. She was sent home in the afternoon. Mrs. Klonoski returned to the Birthing Pavilion that night about 9:00 p.m. complaining of severe epigas-

[1] For ease of reference, we will refer to all members of the plaintiff group in the singular.

tric pain. She remained in the hospital until her death on Monday, May 10, of a massive cerebral hemorrhage. Prior to Mrs. Klonoski's death she was delivered of a healthy baby girl, subsequently named Caroline.

Dr. Klonoski was in San Diego at a medical meeting of cardiologists on Saturday, May 8. He was notified late Saturday of his wife's admission to the hospital. He flew home on Sunday, arriving at the hospital late in the day. His wife was comatose and did not recognize him. After conducting his own investigation into the cause of his wife's death, Dr. Klonoski consulted with an obstetrician in Connecticut and then brought suit.

PRETRIAL DISCOVERY

As is usual in a well prepared medical malpractice case, both sides engaged in extensive pretrial discovery and, as is also usual, the parties squabbled about what information should or should not be disclosed. Over a year prior to trial, plaintiff disclosed, as part of the discovery process, the address in Poland where Mrs. Klonoski's father and sister lived, the address to which her letters (the evidence in dispute) were sent.

The district court issued a nineteen-page discovery order on July 19, 1996, covering disputes between the parties. In part of its order, the court stated:

> defendants shall produce a list of all persons known by them to possess discoverable information related to: (1) marital discord between Dr. and Mrs. Klonoski; and (2) the paternity of Dr. Klonoski's youngest daughter. To the extent defendants can more persuasively support their assertion that such a list (or the names of particular people which would otherwise appear on such a list) is protected by the work product doctrine (i.e., with references to precedent and/or scholarly writings on the subject), they shall provide plaintiffs with a privilege log as contemplated by Fed. R. Civ. P. 26(b)(5) *and* a list of

> cases and/or scholarly writings which specifically support their claim of privilege. Plaintiffs will, of course, then be free to file an appropriate motion to compel.

In its conclusion the court ordered:

> Defendants shall produce a list of the names of individuals having knowledge of discoverable information relating to the issues of marital discord and paternity *and* a general description of the nature of that information on or before August 14, 1996. To the extent that defendants are able, in good faith, to legally support an assertion of privilege with regard to some or all of those names, they shall produce a privilege log as described above.

A final pretrial order was issued on December 19, 1996. It provided that a jury would be drawn on January 7, 1997, and the presentation of evidence would commence on January 13. The order noted that both parties had submitted requests for jury instructions. After noting that some motions in limine had been filed, the court gave the parties until December 31, 1996 to file additional motions in limine, with objections to be filed not later than January 10, 1997. Exhibits were to be premarked and submitted, along with any objections, not later than January 7, 1997. Defendants were ordered to "disclose all documents ordered disclosed after close of business on December 27, 1996, forthwith [sic]."

The penultimate paragraph stated in pertinent part:

> All counsel and the court anticipate conducting a brief *Daubert* hearing prior to the testimony of plaintiffs' psychological expert, who is expected to testify as to the loss of enjoyment of life, or hedonic damage, aspect of the estate's wrongful death claim. The court expects that that hearing will be held at some point during the first week of trial as is convenient to counsel, and the parties agree that one hour should be sufficient.

The order also required a "final will-call witness list." The final paragraph exhorted the parties to try to settle the case. It would appear from the order that all discovery had been completed and the case was ready for trial.

DIRECT EXAMINATION OF DR. KLONOSKI

We next set forth the pertinent parts of Dr. Klonoski's testimony.

After moving from Poland to the United States, Mrs. Klonoski wrote frequently to her family in Poland and sent packages to them. Her father visited her and Dr. Klonoski, and stayed for six months. She was quite happy when he was there, but felt lonely when he went back to Poland. Dr. Klonoski was working long hours at the hospital in Connecticut where he was training. Consequently, he was not spending much time at home with his family. His wife complained about the long hours he had to spend at the hospital. Mrs. Klonoski was thirty-five years of age. She did not have a driver's license and was "house-bound" with their two small children.

In early 1990 there was a period of stress in the marriage. Dr. and Mrs. Klonoski "had some strong discussions." "[T]here was a lot of stress between us." The problem was that Mrs. Klonoski wanted her husband to spend more time at home with the family. He could not accommodate her because he was in the residency program at the hospital which required that he spend a great deal of time there.

Dr. Klonoski became angry at his wife and filed for divorce. The divorce proceedings remained pending for four or five weeks. The couple did not stop living together during this period. There was more stress in the house, "but everything typically went on." At the end of the five-week period Dr. Klonoski and his wife talked things out and decided that they did not want a divorce,

so the divorce proceeding was dropped. In May of every year, Dr. Klonoski gave his wife one rose for each year that had passed since their first meeting in Poland. In May of 1990 the doctor followed this ritual.

Things eventually changed "tremendously" for the better. Dr. Klonoski completed his residency program in June of 1990 and he went on to a sub-specialty program. This enabled him to spend more time with his family. Mrs. Klonoski became pregnant in June of 1990.

Dr. Klonoski had been accepted into the cardiology program at the Mary Hitchcock Memorial Hospital and the Hitchcock Clinic in 1989. The family moved to Lebanon, New Hampshire, in June of 1990. Mrs. Klonoski was excited about the move. It was "a new stage in [their] lives." When the Klonoskis relocated to Lebanon, Mrs. Klonoski was pregnant, their oldest child, Brian, was six, and their daughter Karina was three. A short time later, in July 1990, Mrs. Klonoski had a miscarriage. She was treated by doctors at the Dartmouth-Hitchcock Clinic.

Mrs. Klonoski could not reconcile herself to the fact that her husband had to work harder than Polish doctors. She did not like his going to medical conferences because he was away from the family too much. Outside of this, things were "going great" between Dr. Klonoski and his wife. She "blossomed" and became very self-confident and self-reliant. She obtained a driver's license just before she left Connecticut for New Hampshire. This helped a lot because she could go places with the children and do things.

In October of 1990 she obtained a job as a bank teller. She also attended Lebanon College. After she had been there a time, she was offered a position teaching Polish but refused because she did not want to take too much time away from the family. She was devoted to the children.

Mrs. Klonoski became pregnant again in the fall of 1991. She suffered another miscarriage. Both spouses were devastated. Routine testing was advised and Dr. Klonoski encouraged his wife to take the tests. She did not, however, take all of the tests. Generally speaking, Mrs. Klonoski was healthy. She exercised by doing calisthenics and running.

Mrs. Klonoski made a lot of friends in Lebanon. She was ebullient, very outgoing, very effervescent. Dr. and Mrs. Klonoski socialized occasionally, but were not party people. They preferred to spend their leisure time together as a family.

Mrs. Klonoski became pregnant again in September or October of 1992. Both spouses were worried because of the prior miscarriages. This was the pregnancy that ended in the birth of a daughter, Caroline, and Mrs. Klonoski's death.

There was considerable testimony about Mrs. Klonoski's physical condition during the pregnancy. She did not complain to her husband excessively. In early spring, 1993, Dr. Klonoski accepted a fellowship at Massachusetts General Hospital in Boston. His wife was concerned about moving to Boston.

The family attended Dr. Klonoski's brother's wedding on April 24, 1993. He was an usher and his son, Brian, was the ring bearer. A videotape taken at the wedding showing his wife and daughter was presented to the jury. This was a good period during their marriage marred only by the worries both had about the pregnancy and the move to Boston.

Dr. Klonoski was away at a medical conference in San Diego the week his wife was admitted to the hospital. The conference was important to his career because of the knowledge he would get in his specialty and as a job forum. He had skipped two prior conferences, once because his wife had asked him not to go and another time because she had recently had a miscarriage. Mrs. Klon-

oski was "not thrilled" about his going to the conference, but she did not ask him not to go. Other doctors and some nurses from the Hitchcock Hospital-Clinic establishment also attended the conference in San Diego. Dr. Klonoski left for the conference on May 5; his return was scheduled for May 9. His wife's due date was May 28. Before he left he bought her a bouquet of her favorite flowers for Mother's Day on May 9. At the time Dr. Klonoski left, Mrs. Klonoski had not exhibited any signs of serious problems. He was not even aware that his wife was ill when he left.

Dr. Klonoski called home on Friday evening. His wife told him that everything went fine at her prenatal visit, but that she did not feel well and if she continued to feel badly, she would go to the doctor the next day. She called the next day and told him that she continued to feel poorly and was going to the hospital. She did not mention vaginal bleeding. We have already related the essentials of what happened at the hospital when Dr. Klonoski visited his wife. She was comatose by the time he arrived at the hospital and did not recognize him. He was informed by a neurosurgeon that his wife was brain-dead due to a massive hemorrhage of her brain. He was with her when the life supports were disconnected and she died.

Direct examination of Dr. Klonoski drew to a close with his statement, "I loved my wife without reservation, and I still love her."

CROSS-EXAMINATION OF DR. KLONOSKI

On cross-examination, it was established that Dr. Klonoski was suing, inter alia, as administrator of his wife's estate. He acknowledged that his wife did not have a will and he knew he would receive the first $100,000 of his wife's estate.

It was brought out that initially after their marriage his wife stayed in Poland for a time while he was in the United States working as a medical clerk. During this

time he and his wife corresponded regularly. All of his wife's letters to him were written in Polish. In response to questions he stated that his wife had an older sister, named Marta.

Dr. Klonoski testified, as he had on direct examination, that his wife's father had visited in the fall and winter of 1989-90. Other than Christmas cards, he had not stayed in touch with his wife's family and had not sent them photographs of the children subsequent to his wife's death.

There was a series of questions about his wife's plans for the future. He testified that he had no specific information about his wife's future plans. He did not know any of his wife's friends who worked at the same bank as she did. He had never met any of his wife's work-colleagues.

Dr. Klonoski testified that he and his wife planned the pregnancy that resulted in her death and the birth of their third child, Caroline. He testified that everybody in the cardiology department was very helpful and supportive after his wife's death. Money was collected for his family and food was prepared for the children and himself. All of this was very helpful and he appreciated what was done.

Then followed a series of questions setting the stage for the use of the letters that are the heart of this appeal. Dr. Klonoski acknowledged that he was seeking damages for injury to the marital relationship with his wife and damages for his wife's loss of enjoyment of life. In answer to a question, Dr. Klonoski agreed that the quality of the marital relationship would be an important factor in the enjoyment of life. He also agreed that a good marriage would improve the quality of life. Dr. Klonoski testified, as he had on direct examination, that by the time he and his wife and their two children moved to Lebanon, the marriage was getting along much better; the primary ongoing issue was the time he spent away from the house and family.

In answer to a question, Dr. Klonoski testified that he knew that his wife corresponded with her father and sister, Marta, in Poland. Dr. Klonoski was then asked: "[I]f I were to show you a letter, you'd certainly be able to recognize your wife's handwriting; is that right?" The answer was "Yes, I would." After Dr. Klonoski testified that his wife's sister lived in Krakow, defense counsel began to show the witness a document marked for identification. At this point, plaintiff's counsel requested a bench conference. The request was granted.

We feel it necessary to quote at length the bench conference.

> MS. LUKEY: I don't have a clue what this is, but it's never been produced in discovery, and there is absolutely no question that we requested anything that they intended to use in this case. I have no idea where it came from or what it might be. And I assume it's in Polish, so I can't read it, but really this is unfair.
>
> THE COURT: What is it?
>
> MR. BASSETT: It's impeachment. This is a letter written by Mrs. Klonoski to her sister Marta in Poland. And this letter happens to have been written in late April of 1993 and early May of 1993, and it contains in it a description of a number of things, most prominently the marital relationship and the significant problems that Mrs. Klonoski believed existed at that time, and I don't believe—we actually just got that letter last night.
>
> MS. LUKEY: Your Honor, we had, as you recall, a court-ordered disclosure from them pertaining to anything to do with alleged marital discord. This was not disclosed to us. I don't know where it came from. I don't know what he's doing, but it obviously doesn't give me the opportunity to speak, for example,

to his sister—her sister, if that's the recipient. I really think this is litigation by ambush and totally inappropriate. This is a situation with an actual court order.

MR. BASSETT: Your Honor, it's legitimate cross-examination. We just got that last night based on the testimony that we had heard in this case, and it's legitimate cross-examination. We are not required to disclose what we are going to use on cross-examination.[2] We specifically brought it up with the Court, and you said for impeachment and credibility, we did not have to disclose it, and we didn't have it until last night. But in any event, we want to use it for that purpose, and I think Attorney Lukey is entitled to go into those issues on reexamination.

MS. LUKEY: Your Honor, he may not have to disclose it on a trial exhibit list, but in discovery he certainly has to disclose it if he has knowledge of it, and we actually had to get a court order to get their evidence on marital discord. That was the reason we asked for it.

THE COURT: But he didn't have it.

MR. BASSETT: Didn't have it until last night.

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[2] The defendants claim that "there was a pre-trial discovery order stating that exhibits to be used only on cross-examination need not be disclosed." Def. Br. At 34. Defendants state that "[t]his order does not appear in the record, but the plaintiff acknowledged on the record that the parties did not have to disclose exhibits used for cross-examination. *Se* RA at 3657-58." *Id.* at 34 n.19. We have read the record pages cited and cannot find any concession by the plaintiff's attorney that the asserted off-the-record ruling was ever made. Defendants' citation to the record on appeal contains the material in the text, and Attorney Lukey's response to it. The cited pages show *defense* counsel, not Attorney Lukey, making such a claim. We note, too, that any such ruling by the court would have exempted considerably more material from disclosure than the discovery rules provide. We think it rather strange that, if such a broad ruling had been made, it is not in the record.

MS. LUKEY: He should have had it, and what is it that they're contending justifies ambushing us with it at this moment in time.

. . . .

MR. BASSETT: We, frankly, haven't had the entire thing translated yet because it was received—this one was received this morning actually. All we have had is a skeletal translation of it, your Honor, but I think at this point it's an admission by a party opponent. It's her letter, and that's how it would come into evidence.

THE COURT: What does it say?

MR. BASSETT: Well, it says quite a few things. He can translate it for us.

THE COURT: I can't determine the relevance of "quite a few things." That's not relevant.

MR. BASSETT: I'll read you my understanding of it, but it's—this is the last letter from Jola. This is a paraphrasing of it right now, your Honor. We would ask him to read it because he can read Polish and he can translate it.

She goes on to the subject of his—of the pregnancy: I'm afraid of what's going to happen. He cares only about his career. I was surprised by his announcement that he was leaving for California and for a business trip.

There are problems with her spending habits. He doesn't like it. I bought a baby stroller, and he screamed at the top of his lungs. I think we should get a divorce.

She mentions that Richard is working so hard to become a cardiologist. She doesn't say her situation will improve directly, but intimation is she has a stake —I don't understand what all that is. I don't frankly,

know what everything is in there, but just the fact that she says she thinks we should get a divorce is enough, your Honor. And he can translate it.

And its an admission. . . . This is a party-opponent admission. And just as we're entitled to make the arguments that outweigh it, so, too, Attorney Lukey can.

There are three more—four more of those. That's the first of the ones that I intend to offer in evidence.

MS. LUKEY: I would like to know how long they've known of the existence of these letters regardless of when they may have received this one.

MR. BASSETT: I'll make a representation of that.

THE COURT: How long have you known?

MR. BASSETT: We've known about them, it's no more than two days. We received the first of them—

THE COURT: No, no.

MS. LUKEY: How did you know they were there?

MR. BASSETT: We found Marta this week. We found her three days ago. We looked for her father.

MS. LUKEY: He's dead.

MR. BASSETT: And he's dead; that's right. He died last winter. That's who we were trying to find. Instead we found Marta this week, and I can certainly get somebody to prepare an affidavit to say that she was not spoken to until two days ago, and in fact we didn't get the first transcript of these letters until yesterday afternoon. They were faxed from Poland last night. The meeting with Marta took place last

night in Poland. They were faxed to us, and I spent most of the night up with these letters, and translators spent most of the night with the letters, too. We have the other letters translated. This one we just received within two hours. So we haven't had it fully translated.

MS. LUKEY: I have a serious issue with this, your Honor. It's a little bit like springing Dawn Rafferty on us right after Christmas when she turns out to be Linda Bowers' niece, and they've known about her right along. There's nothing that I heard to suggest this is not something they could have determined earlier if they intended to use it. This is truly an ambush. They knew about her sister. That's not new. I don't know what it is they think is new about this. But the fact that they choose to wait until three and a half weeks into a trial and then spring it on us as purported impeachment I find extremely troubling and inconsistent with the rules.

I also have a very strong suspicion that the reason that they made a point with you in our pretrial conference some months ago of saying we don't have to show any impeachment, right, is because they knew exactly what they intended to do.

I don't know what Jola wrote, and it's clear that Dr. Klonoski doesn't know what Jola wrote. I find it very upsetting and extremely inconsistent with the open disclosure rules of current litigation that this would occur. This is the kind of thing that occurred 25 years ago and was the whole reason the Rules of Civil Procedure were adopted. I mean I've built a whole case obviously, and they're suddenly coming in and trying to spring something on me about what the wife supposedly felt. She's dead. I can't ask her.

But I do not feel this is appropriate. I have heard nothing from Mr. Bassett that suggests why he

couldn't have come up with this earlier if it was something they intended to use. You don't keep investigating the case when the trial is in process.

MR. BASSETT: Yes, you do.

THE COURT: A lot of people do.

MS. LUKEY: But it's inappropriate.

MR. BASSETT: Based on the type of testimony we got in this case—

MS. LUKEY: What in this case has justified this that you didn't know before?

MR. BASSETT: We couldn't find them, and we found them now, your Honor.

MS. LUKEY: All you had to do was ask for the address.

. . . .

MS. LUKEY: Your Honor, my problem is the method that they've done this.

THE COURT: Your problem is you don't accept that they just knew about it. I do accept that they did just find out as he's represented to me.

MS. LUKEY: It isn't just whether they just knew about it. You're right. I do not believe that they just found out about it. You're absolutely correct.

But quite apart from that is the fact that what one is supposed to do is to do one's discovery and so forth for trial by the discovery disclosure date in order to ensure under the Rules of Civil Procedure, the information you come up with is shared if appropriately requested by the other party. In this case it was not only requested, we had to get a court order. We got the court order regarding all evidence they had on the subject of alleged marital discord.

MR. BASSETT: That was to identify the witnesses.

THE COURT: Take the next step. Then you have all the evidence they had on marital discord.

MS. LUKEY: And, frankly, that evidence doesn't trouble me. Then they come up with this.

THE COURT: That's a different test.

MS. LUKEY: I understand, your Honor. My point is if it were in fact the case that it was okay to send your investigator out while the trial was in progress, what everyone would do in order to avoid the necessity of disclosing materials that are particularly good for ambushing the other side is not do their investigation until the time of trial.

THE COURT: Well, I hear you, but I don't agree with you. You took the initiative to put on the evidence of a good marriage, stable marriage. Everything's hunky-dory and wonderful.

MS. LUKEY: As far as he knew.

THE COURT: Well, as far as he knew. But to the extent that's relevant, I've already—my view, I don't think it's particularly relevant one way or the other. But both of you think it is, and once you do that, they have a right to then challenge whether that was the case. If they just got this and they're going to use it for impeachment, I think they have a right to do it.

. . . .

THE COURT: All right. I'll allow their use, Mr. Bassett. They'll be admissible under Rule 801(d)(2).

MS. LUKEY: Your Honor, there's one other issue that I think—

THE COURT: Not yet.

MS. LUKEY: There is one other issue that I think—I'm a little troubled about here that I would raise to you. This doesn't give me the opportunity to find out from the sister whether there's more to the story, more letters, another side, an explanation, whatever. I mean I cannot imagine, short of paying out large sums of money, what would cause a sister to turn over these letters, which has me a bit troubled, and I would like to know if there is more. I can't do that in the middle of trial. I'm about to close in—you know, ten minutes after he finishes his cross.

So I do remind the Court again, he placed me in an impossible position in that regard because I don't know whether there's more out there, another side to the story or some explanation. Nor do I know whether money has changed hands. I don't know anything. I cannot imagine why a sister would turn these over to be used against her sister's estate.

THE COURT: I'm not sure that's relevant. The only question is are they legitimate documents.

MS. LUKEY: But my ability to examine Marta is essentially nonexistent because of the fact that—

THE COURT: Well, I'm not sure Marta makes a difference.

MS. LUKEY: Well she might make a difference if it turns out that there are other letters, ones that came after, ones that came before, explanatory letters, phone conversations, none of which I can possibly know. I don't know if this is complete. I don't know if—

THE COURT: Are you asking for a continuance?

MS. LUKEY: No, I'm not asking for a continuance. I'm asking to have these documents excluded,

your Honor, on the basis that it's litigation by ambush.

THE COURT: Yeah. That objection has been overruled. All right.

After Dr. Klonoski identified the letters as being in his wife's handwriting, the court held an extended hearing on their admissibility. After considering the arguments of counsel it issued rulings accompanied by comments:

I think these letters pose a substantial risk of unfair prejudice that would outweigh their probative value. I think their probative value, to the extent they have any probative value, lies on the fact of whether or not there was marital discord, whether a divorce was impending, whether she was happy or not in the marriage, why she was unhappy, and the degree of her unhappiness, as expressed in some of these statements, I think might be tangentially relevant. But to present that evidence in this form to the jury poses a very grave risk that they would start to be inflamed or distracted onto issues that aren't relevant in the case; that is, was Jolanta Klonoski a good or bad person? More importantly, was Dr. Klonoski a good or bad person? And factor that into their award, if there is an award, and they shouldn't. I think we all agree they shouldn't be factoring that into their award.

Now, they're probably cumulative anyway, because you put in—in fact, your case seems to be three experts and everybody says there's a bad marriage. So in a sense it's cumulative. So I agree it's better to have words in the decedent's mouth, so I'm willing to cut you some slack in that regard. And despite Attorney Lukey's, I think, well-taken position that these are pretty late in the ball game and she doesn't really have a great opportunity to deal with that, but I'm not going to give you the ruling, Attorney

Lukey. What I'm going to do is give you some relief by limiting the admissibility of these statements to those statements that directly speak about her unhappiness in the marriage, but not in histrionic terms and not in terms that pose a risk of appealing to the passion, prejudice of the jury, and not in terms that pose a risk of putting Dr. Klonoski in such a bad light that that might affect an award in this case. Like I said, I'll give you a chance to rebut, if you can and want to, just as to these statements, but I can't imagine you will want to.

. . . .

In my judgment—well, as I think about it, it's probably an inconsistent view myself, but having read these documents, the four documents you presented, it's my conclusion that—certainly to the extent that you claim anything is relevant in there, most of it is not relevant. Material statements that are made in these documents that might be relevant that seem to portray the former plaintiff, Dr. Klonoski, in a very poor light are not relevant to the issue of Mrs. Klonoski's future hedonic damages. To the extent they are relevant, or one might argue that they are relevant as a predictor or prognostication of her future happiness, I find that those statements, though relevant in that respect, would, nevertheless, be excluded. I do exclude them on grounds that their probative value is far outweighed by the risk of unfair prejudice in that those statements would tend to, in my judgment, distract the jury and confuse the jury and inflame the passions and prejudice of the jury, such that they may be at risk of focusing on the nature of Dr. Klonoski as a person in calculating a damages award for the estate, which we all agree would not be proper.

To the extent—to the limiting [sic] extent it gives a marriage view different than this—than Dr. Klonoski

ski and others portrayed, I think they are relevant. And I think by going through the letters and allowing you to admit those portions of the letters that give that contrary view, without the inflammatory baggage of the other statements and comments in the letters, I think your interests are fairly protected.

So that's my ruling, I acknowledge that Attorney Lukey makes a very good point about late discovery, not that you've violated my order of disclosure. I find that you've not. And not that you had the document in a—in a timely fashion that you could have delivered them to the plaintiffs in a meaningful timely way. I find you didn't. But she is somewhat at a prejudicial point in that there are other letters that may present a different view altogether of this.

But again, we're at the point where I think we're cumulative anyway on the item of was there discord or not discord in the marriage, and—that's not a very major issue in the case, in any event. So here is what the potentially inconsistent part, I suppose, with respect to all of those other statements in these letters that I have not agreed to allow you to read to the jury or present to the jury. I would—I also exclude those on grounds that, to the extent they are inflammatory but fall below the line of proposing an unfair risk of substantial prejudice, outweighing their probative value, I would exclude them on the additional independent grounds that Attorney Lukey does not have the opportunity to have those other nine letters translated and examined for the possibility that they may have equally praiseworthy and laudatory comments about Dr. Klonoski in them. So who knows. Maybe they would balance them off. So that's just another independent reason why I wouldn't allow the statements to be denigrating of Dr. Klonoski or certainly his relatives into evidence. All right.

The court allowed the following excerpts in evidence. They were read to the jury by the defendants' translator:

> Despite the fact that I want to save this marriage very much, I cannot stand being treated as a moron, but that's how Richard likes to behave. I think he will never appreciate me as a person and will always expect from me obedience and approval of anything he proposes. This does not satisfy me and does not provide even a bit of happiness.

Excerpt from letter of May 20, 1990 (Ex. LLL, RA 4487; RA 3854).

> Now I am with him not for myself but for the children and I know that the day will come when we separate because I will not stand being with him to the end of my life.

Excerpt from letter of August 27, 1990 (Ex. LLL, RA 4488; RA 3855).

> And I knew that something was wrong. I did not have to wait long because in the evening he came to my bed and graciously informed me that on May 5, 6 and 7 he flies to California, San Diego, for another conference. I could not believe it but he said nobody was going to change his plans. After that last conference I told him I do not want him to ever fly without me.

Excerpts from letter of April 27 and May 1993 (Ex. LLL, RA 4489; RA 3856).

> As you can see, I think we should get a divorce because we are tormenting each other and no good will come between us. I only pity this yet to be born child because it will never see love between its parents. Sooner or later both I and he will not be able to stand this tension and misery between us any more.

Excerpt from letter of April and May, 1993 (Ex. LLL, RA 4489; RA 3856-3857).

Prior to reading the letter excerpts and marking them as exhibits, defendants put on the following witnesses whose testimony we summarize. Joan Conrad worked in the cardiology department and became acquainted with Dr. Klonoski. When she congratulated him on the coming birth of another child, he said: "It wasn't my idea. This wasn't planned." When Conrad asked Dr. Klonoski about his wife, he replied: "She's always complaining, lots of aches and pains. Always complaining about headaches, and I don't pay attention to that anymore." Conrad testified that there was no positive feedback from Dr. Klonoski about his wife.

The next witness was Dr. John Robb, a cardiologist, who worked with Dr. Klonoski. Accompanied by Dr. Klonoski's parents, he met Dr. Klonoski at the Lebanon Airport on his return from the meeting in San Diego, and drove him to the hospital. Dr. Robb testified that Dr. Klonoski was crying when Dr. Robb picked him up at the airport, that he was "very distraught and upset" and "grieving."

Ellen Fullington was a medical secretary at the Hitchcock Hospital. She worked for Dr. Klonoski as well as other doctors. She testified that Dr. Klonoski's comments about his marriage were negative.

Dr. Douglas H. James was director of the fellowship program at the Hitchcock Hospital. Dr. Klonoski discussed his marriage with him during a review of his performance. Dr. Klonoski felt that his performance was adversely affected by stress at home.

Dawn Rafferty worked with Mrs. Klonoski at the bank. She testified that Mrs. Klonoski was not happy with her marriage. She was considering a divorce, but was afraid that the children would be taken away from her. Mrs. Klonoski complained that her husband was only interested in money. He worked extremely long hours and did not pay attention to her or the children. She wanted to have

another child when she became pregnant again. Dr. Klonoski was not happy about her pregnancy. She felt that he wanted her to have an abortion.

The final witness for defendants was the translator who read the letter excerpts to the jury.

Dr. Klonoski was recalled as rebuttal witness. He testified as follows:

> Q. Were you aware before this weekend that your wife had written thoughts of divorce to her family?
>
> A. No, I was not.
>
> Q. Did you have any idea that she felt that way?
>
> A. No, I did not.
>
> Q. When you learned about her feelings, at least as contained at these points in time in these letters, what steps did you take?
>
> A. I was very stunned and distressed that her perception of things was so vastly different from what she represented to me and was distressing her at the same time and that she thought that she could get more answers or more comfort by writing to her family in Poland and not discussing it with me.
>
> When I found that out, I instructed the attorney in Connecticut who is handling the probate of her estate that I waive any right to the proceeds of the estate, and I established an irrevocable trust in the names of our children equally and relinquished all rights to them with the trustee, that is not myself, and that is the trustee's attorney, Jennifer Snyder, from Hale and Dorr in Boston.
>
> Q. And what is your understanding as to whether you now have any claim to the proceeds of the estate?

A. I understand that with the execution of the trust, I have no claim to any of the proceeds in her estate.

Q. One final question, Doctor. We heard testimony on the defense case that you did not want the pregnancy that resulted in Caroline's birth. Is that true?

A. No, that's not true.

On cross-examination there were questions about when the irrevocable trust was established, which were answered ambiguously. There was also a series of questions relative to the testimony by defendants' witnesses.

Dr. Klonoski having withdrawn his own claims, the case went to the jury on only one claim, that of Mrs. Klonoski's estate. The jury returned a defendant's verdict, and the plaintiff appealed.

II.

APPLYING THE DISCOVERY RULES

We begin our analysis with a brief review of the pertinent rules of discovery.[3] Rule 26(a)(3)(C) requires each party to disclose to other parties, without awaiting a discovery request, the following information:

> (C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Fed. R. Civ. P. 26(a)(3)(C).

This rule requires that: "[u]nless otherwise directed by the court, these disclosures shall be made at least 30 days

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[3] Rule 26(a)(1) does not apply in the District of New Hampshire. *See* Local Rules of the United States District Court for the District of New Hampshire, LR 26.1(a).

before trial." *Id.* It is obvious that defendants did not follow the strictures of Rule 26(a)(3)(C) with respect to the letters from Mrs. Klonoski to her sister.

In addition to the mandatory pretrial disclosures, parties may obtain discovery of further matter by various methods. *See* Fed. R. Civ. P. 26(a)(5). Rule 26(b)(1) defines the scope and limits of discovery:

> (b) *Discovery Scope and Limits.* Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26(b)(1). Like Rule 26(a)(3)(C), Rule 26(b)(1) provides no exception for documents found during belated investigation that takes place after the trial has begun.[4] On the contrary, the plain language of this Rule 26(b)(1) contemplates wide-ranging discovery to the fullest possible extent.

Such a broad reading is supported by leading Supreme Court precedent. As the Court stated in *Oppenheimer*

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[4] The district court has discretion to alter the discovery requirements as appropriate for a given case, if the rules permit and if justice is served thereby. *See* Fed. R. Civ. P. 26(a)(1), 26(a)(3), 26(b).

Fund, Inc. v. *Sanders,* 437 U.S. 340 (1978), the word "relevant" encompasses

> any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. . . . [D]iscovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.

Id. at 351 (citing *Hickman* v. *Taylor,* 329 U.S. 495, 501 (1947)).

In *Hickman,* the Court characterized the "pre-trial deposition-discovery mechanism established by Rules 26 to 37 [as] one of the most significant innovations of the Federal Rules of Civil Procedure." *Hickman,* 329 U.S. at 500. The Court went on to discuss the purpose of the discovery rules:

> Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain *the fullest possible knowledge of the issues and facts before trial.*

Id. at 500-01 (emphasis added; footnotes omitted). The Court added that the "deposition-discovery rules are to be accorded a broad and liberal treatment." *Id.* at 507. This is because

> [m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. *The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.*

Id. (emphasis added).

Similarly, in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958), the Court stated that "[m]odern instruments of discovery serve a useful purpose . . . . They together with pretrial procedures make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the *fullest practicable extent*. Only strong public policies weigh against disclosure." *Id.* at 682 (emphasis added; citation omitted).

Based on the plain language of Rule 26 and the broad scope that it has been given, it would appear that Mrs. Klonoski's letters fit well within the rule's reach. The letters plainly contain information "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). As noted, Rule 26 provides no exception for documents found after discovery deadlines have passed.

To the extent the rules contemplate additional material that a party finds after it has provided discovery to the other side, the rules require prompt supplementation of its additional material so the opposing party is not misled by the original discovery responses as the opposing party prepares its case for trial. *See* Fed. R. Civ. P. 26(e). Rule 26(e) provides in pertinent part:

> (e) Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:
>
> > (1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.
> >
> > (2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

Fed. R. Civ. P. 26(e). In the instant case, the defendants provided no supplementation of their prior disclosures by adding the letters in question to the list of evidence to be offered at trial.

In 1993, the Federal Rules of Civil Procedure were significantly amended, particularly Rules 26(e) and 37 (c)(1). The changes to Rule 26(e) substantially expanded the duty to supplement. Under the pre-1993 version of Rule 26(e), supplementation was required only in a few, limited circumstances. The current version of the rule, as quoted *supra*, imposes a broad requirement on parties to update their earlier disclosures and discovery responses. *See* 8 Charles Alan Wright et al., *Federal*

Practice and Procedure § 2049.1 (2d ed. 1994 & Supp. 1998) ("Wright & Miller"). Thus, even if the defendants could argue that the pre-1993 rule might not have required them to disclose the letters to the plaintiff, they have no such argument under the 1993 amendments to the supplementation requirement.

IS PRECLUSION THE APPROPRIATE REMEDY?

The 1993 amendments to the Federal Rules also added Rule 37(c)(1) which provides:

> (c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.
>
> > (1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

Fed. R. Civ. P. 37(c)(1).

Prior to adoption of Rule 37(c)(1), no rule specifically provided sanctions for the failure to supplement discovery. Courts were free to apply their discretion in sanctioning Rule 26(e) violations. The new rule is mandatory: a party that fails to make the required disclosures "shall not, unless such failure is harmless, be permitted to use [undisclosed] evidence at a trial." *Id.* To be sure,

the rule somewhat tempers this mandate by permitting courts to excuse failures to disclose to some degree (i.e., to impose other sanctions "in lieu of this sanction"). Fed. R. Civ. P. 37(c)(1). But the new rule clearly contemplates stricter adherence to discovery requirements, and harsher sanctions for breaches of this rule, and the required sanction in the ordinary case is mandatory preclusion.[5]

Even before the 1993 amendments, in *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (per curiam), the Supreme Court stressed the policy reasons for enforcing the discovery rules. The most severe sanctions provided by the rules, the Court explained, "must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *Id.* at 643. While a warning alone might have made the plaintiffs in that case comply with all future discovery orders, "other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts." *Id.* Thus, enforcement of discovery rules and orders is necessary, the Court concluded, to prevent abuse by future litigants. *Id.*

It appears, therefore, that the letters in question were covered by the disclosure requirements of Rule 26, including the duty to supplement, and that defendants' failure

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[5] For this reason, pre-1993 cases analyzing the sanction issue under the pre-amendment rubric retain only limited authority in this post-amendment era. *See, e.g., Freund* v. *Fleetwod Enters., Inc.*, 956 F.2d 354, 358 (1st Cir. 1992) (upholding discretionary sanction of preclusion); *Newell Puerto Rico, Ltd.* v. *Rubbermaid, Inc.*, 20 F.3d 15, 22 (1st Cir. 1994) (upholding discretionary refusal to preclude); *Johnson* v. *H.K. Webster, Inc.*, 775 F.2d 1, 8 (1st Cir. 1985) (requiring a "balancing" of competing interests and requiring "some evasion or concealment, intentional or not, on the part of the litigant offering the evidence").

to disclose them prior to trial precluded defendants from using the letters at trial. The district court did not take this position because it found the letters to fall within an exception to the discovery rules for material that is presented "solely for impeachment purposes." Fed. R. Civ. P. 26(a)(3).

DO THE LETTERS FALL WITHIN AN EXCEPTION TO THE DISCOVERY RULES?

Rule 26(a)(3) provides:

> *Pretrial Disclosures.* In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties [certain delineated] information regarding the evidence that it may present at trial *other than solely for impeachment purposes*:
>
> . . . .

Fed. R. Civ. P. 26(a)(3) (emphasis added).

Neither the Rule itself nor the advisory notes define impeachment evidence. The federal cases that have decided whether evidence falls within the impeachment exception to the discovery rules are, for the most part, personal injury cases. They frequently deal with two kinds of evidence: video surveillance tapes of a plaintiff's activities subsequent to the injury giving rise to the suit; and information that a defendant has of the plaintiff's prior medical history.[6] Although some district courts have found video surveillance tapes to be "solely" impeachment evidence, *see* Fed. R. Civ. P. 26(a)(3), the weight of authority seems to be that such evidence is both impeaching and substantive and should be disclosed. *See Wegner* v. *Cliff Viessman, Inc.*, 153 F.R.D. 154, 157-59 (N.D. Iowa 1994).

And this approach makes evidentiary sense. As the Wright and Miller treatise put it, after reviewing the case law:

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[6] Other cases deal with expert witnesses who change their opinions or theories.

> If a party plans to testify to one version of the facts, and the opponent has evidence supporting a different version of the facts, the opponent's evidence will tend to impeach the party by contradiction, but if discovery of this kind of evidence is not permitted the discovery rules might as well be repealed. Even those who have been most concerned about protecting impeachment material recognize that substantive evidence must be subject to discovery even though it also tends to contradict evidence of the discovering party.

8 Wright & Miller, *supra*, § 2015, at 212 (footnote omitted).

The only circuit court that directly addresses this subject is *Chiasson* v. *Zapata Gulf Marine Corp.*, 988 F.2d 513 (5th Cir. 1993). In holding that a video surveillance tape was not "solely" impeachment evidence, the court defined substantive evidence as "that which is offered to establish the truth of a matter to be determined by the trier of fact." *Id.* at 517. It then stated: "Impeachment evidence, on the other hand, is that which is offered to 'discredit a witness . . . to reduce the effectiveness of [her] testimony by bringing forth evidence which explains why the jury should not put faith in [her] . . . testimony.' " *Id.* (alterations in original) (quoting John P. Frank, *Pretrial Conferences and Discovery—Disclosure or Surprise?*, 1965 Ins. Law J. 661, 664 (1965)).

The court recognized that some evidence serves both functions, and, because such evidence is not "solely offered for impeachment," it is not covered by the exception to the Rule 26 discovery requirements. The court held: "Because the tape is, at the very least, in part substantive, it should have been disclosed prior to trial, regardless of its impeachment value." *Id.* at 517-18.[7]

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[7] There is a Seventh Circuit case that can be construed to be contrary to *Chiasson*—*DeBiasio* v. *Illinois Cent. R.R.*, 52 F.3d 678

The same is true of the disputed evidence here. The excerpts from the letters written by Mrs. Klonoski to her sister were at least in part substantive, and therefore they did not fall within the "solely for impeachment" exception of Fed. R. Civ. P. 26(a)(3). The letter excerpts constituted substantive evidence because, separate and apart from whether they contradicted Dr. Klonoski's testimony, they tended "to establish the truth of a matter to be determined by the trier of fact." *Chiasson*, 988 F.2d at 518. This is true even though, in addition to their substantive content, the excerpts tended to contradict Dr. Klonoski's testimony regarding the state of his marriage.[8] We hold, therefore, that the district court erred, as a matter of law, in finding the letter excerpts to fall within the exception to the discovery rules for evidence introduced "solely for impeachment purposes" of Fed. R. Civ. P. 26(a)(3).

Nor do we think that Fed. R. Evid. 801(d)(2) opens the evidence door to the excerpts because they are admissions against a party opponent, as defendants argue. The question is not the admissibility of the excerpts under the Federal Rules of Evidence but whether they were barred because their introduction violated the pretrial discovery orders of the district court and federal discovery rules. The rules of evidence do not trump the discovery rules contained in the Federal Rules of Civil Procedure. The purpose of the discovery rules is to provide for the "fullest

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(7th Cir. 1995). But the ruling in *DeBiasio* was highly fact-specific and does not govern the present case. In addition, despite its dicta regarding abuse of discretion, *DeBiasio* held that the error was harmless, and affirmed the jury verdict. 52 F.3d at 686; *see also supra* at 31 n.5.

[8] Nor did this contradiction necessarily mean that Dr. Klonoski was deliberately lying. It is not uncommon for one spouse's view of the marriage to differ from that of the other spouse. Moreover, it is undisputed that Dr. Klonoski was not aware of the letters, prior to being asked to read them on cross-examination at trial. He did not know that letters containing such statements even existed. Perhaps if these had been letters written by Dr. Klonoski himself, they might be deemed "solely for impeachment."

possible" pretrial disclosure of admissible evidence, to "reduc[e] the possibility of surprise," *Hickman*, 329 U.S. at 500-01, and to insure "a fair contest," *Procter & Gamble*, 356 U.S. at 682.

As we have discussed, *supra*, absent some unusual extenuating circumstances not present here, the appropriate sanction when a party fails to provide certain evidence to the opposing party as required in the discovery rules is preclusion of that evidence from the trial.

We have recently condemned trial by ambush tactics and for this reason vacated a verdict returned for the defendant. *Licciardi* v. *TIG Ins. Group*, 140 F.3d 357 (1st Cir. 1998), centered on the testimony of a medical expert who:

> changed course 180 degrees from his report in his testimony on a key topic at the heart of plaintiff's case. Further, he went into a new area of testimony. There was no prior disclosure of the coming volte face; indeed there was a misrepresentation in the supplemental answer to interrogatories filed two days after the jury was impaneled that the expert's testimony would be the same as in his initial report.

Id. at 359 (footnote omitted). We found this "volte face" to be "highly prejudicial to plaintiff's case." *Id.*

We recognize that the focus of *Licciardi* was on the divergence between the pretrial disclosure of the testimony of a party's expert witness and his trial testimony. This court's forthright condemnation of trial by ambush, however, applies to what happened in the case before us.

Labadie Coal Co. v. *Black*, 672 F.2d 92 (D.C. Cir. 1982), is factually closer to the situation before us. In *Labadie*, the D.C. Circuit found that the district court's admission of documents was erroneous and prejudicial because plaintiff was not given notice of the documents until after it had rested its case on the last day of trial.

The court noted that "when the documents were finally produced, [plaintiff] had little, if any, time effectively to . . . cross-examine [defendant] as to their content." *Id.* at 94-95. In the present case, plaintiff was even more prejudiced by the lack of discovery. He had virtually finished presenting his entire case to the jury; Dr. Klonoski's direct testimony had been completed. His depiction of the state of the marriage was very different from the way he would have characterized it if his late wife's letters had been disclosed to him prior to his testifying.

We cannot help being impressed by the exquisite timing of the injection of the letters into the trial. Dr. Klonoski, the last witness in the plaintiff's case, had finished his direct testimony. The plaintiff's case had been completed. Cross-examination started with some innocuous questions. This was followed by what clearly were questions setting up Dr. Klonoski for the introduction of the letters. Whether by design or accident the timing could not have been better for defendants.

Policy reasons also militate against the district court's ruling that the letters are exceptions to the discovery rule. If letters or other documents are allowed in evidence after a trial starts for the sole reason that they were not obtained sooner by the party offering them, the rules of discovery and court orders pertaining thereto would become empty phrases signifying nothing. Trial by ambush would be re-born. Enforcement of discovery rules and orders is necessary to prevent abuse by future litigants. *See National Hockey League*, 427 U.S. at 643.

THE ADEQUACY OF DEFENDANTS' EXPLANATIONS

Defense counsel argued successfully to the district court that the reason the letters had not been disclosed was that counsel had not received them until two days prior to the start of their cross-examination and did not have an opportunity prior to their use at trial to have them translated

from Polish to English. This explanation was accepted by the district judge. But it is beside the point. The fact that a party had not actually obtained certain documents before the discovery deadline does not excuse a violation.

The belated appearance of the letters violated the plain meaning and the intent of the discovery rules. It also ignored the specific requirements of the court's pretrial discovery orders.[9] The contents of Mrs. Klonoski's letters were not disclosed prior to trial, as they should have been under the July 16, 1996 discovery order which provided specifically: "defendants shall produce a list of all persons known by them to possess discoverable information related to: (1) marital discord between Dr. and Mrs. Klonoski . . . *and* a general description of the nature of that information." The final pretrial order was based on the parties' representations that discovery had been completed and the case was ready for trial.

Nor can the defendants be excused for their failure to comply. That defense counsel did not obtain the letters until two days before their use at trial on cross-examination does not make them admissible. Defendants had been furnished with the address of Mrs. Klonoski's father in Poland more than a full year before trial. Her father and sister lived at the same address. The defendants could, at that time, have undertaken the same investigation that for some unexplained reason did not come to fruition until the trial was near completion. They have offered no legitimate explanation for why they waited as long as they did, knowing that the federal rules and the court had required them to disclose potential trial exhibits and all relevant responses to discovery requests well before the trial

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[9] We are aware, of course, that the district court found that the letters did not violate its pretrial discovery orders. We assume, absent any explanation from the district court as to its reasoning, that this conclusion was based on the court's incorrect ruling that the letters were excepted from discovery under the "solely for impeachment" provision of Fed. R. Civ. P. 26(a)(3). *See infra* at 41.

began.[10] This suggests that the defendants may have been, at best, either lax or negligent in pursuing pretrial discovery.

Finally, defense counsel admitted that they at least knew about the letters and the general outlines of their contents two days earlier than they disclosed them, i.e., they knew about them before Dr. Klonoski testified on direct. Counsel could have put plaintiff on notice that certain new and hitherto undisclosed evidence was on the verge of becoming available on the issue of marital discord. If such notice had been given at that point, prior to Dr. Klonoski's testimony on direct, then undoubtedly his testimony would have been different and the present problem would most likely never have arisen.

THE DISTRICT COURT'S RULING

After reading the district court's rulings and comments, we have difficulty understanding the basis of its decision to allow excerpts from the letters to be read to the jury. The first paragraph of the court's order states: "I think these letters pose a substantial risk of unfair prejudice that would outweigh their probative value." Despite this pronouncement, the court admitted excerpts from the letters into evidence. With due respect, we do not think that the prejudice was reduced appreciably by limiting the court's ruling to the excerpts read to the jury. In fact, by shortening lengthy letters and allowing into evidence only the inflammatory portions, their prejudicial impact was probably heightened.

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[10] Indeed, in the side bar conference when the letters were first disclosed during Dr. Klonoski's cross-examination, defense counsel represented to the court that counsel had "just got[ten the first letter] last night *based on the testimony that we had heard in this case*, and it's legitimate cross-examination." (Emphasis added.) Later discussion made it clear that defendants' dispatching their investigators to Poland had nothing to do with any "testimony that [they] had heard in [the] case."

We are also puzzled by the statement: "I acknowledge that Attorney Lukey makes a very good point about late discovery, not that you've violated my order of disclosure. I find that you've not." The only basis for this finding was that the court believed the letter fell within the impeachment exception provisions of Fed. R. Civ. P. 26 (a)(3). We have found, *supra*, that the exception does not apply. Clearly the introduction of the letters without prior notice to plaintiff violated the pretrial discovery order of July 19 and the final pretrial order.

We agree with the court's statement that Attorney Lukey "is somewhat at a prejudicial point in that there are other letters that may present a different view altogether of this." We believe this greatly understated the predicament in which plaintiff's attorney found herself. First, Attorney Lukey was correct that, because of the defendants' failure to provide these letters during the discovery process, plaintiff's counsel was unable to conduct her own investigation which might uncover other letters from Mrs. Klonoski explaining what she wrote in the letters introduced by defendants, or which might demonstrate that Mrs. Klonoski's anger was a passing feeling that did not reflect her overall view of the marriage. But more critically, plaintiff had already planned and executed his trial strategy based on the evidence available to the parties through discovery. He had presented his entire case, including the direct examination of his lead witness. To spring these letters—hitherto unknown by plaintiff and his attorneys—upon the plaintiff at that stage of the litigation was a lot more than "somewhat . . . prejudicial." Realistically, it was devastating to his ability to succeed with the jury.

A CONTINUANCE AS A POSSIBLE REMEDY

The district court asked plaintiff's counsel at least twice if she wanted a continuance. She said she did not want one because she did not think it would do any good. It

is true, as defendants argue, that in some cases we have found that surprise evidence could be combated by granting a continuance to the surprised party. *See Newell Puerto Rico, Ltd. v. Rubbermaid, Inc.*, 20 F.3d 15, 22 (1st Cir. 1994). In *Licciardi* we discussed at length the effectiveness of a continuance as an antidote to surprise evidence. 140 F.3d at 366-67. As we stated there:

> It is true that, where effective to counteract the surprise to one party wrought by the other party's failure to abide by Rule 26, a continuance or the calling of a rebuttal witness is preferable to terminating the trial and beginning anew. However, a continuance is not effective in every circumstance to counteract the unfair surprise. *See Thibeault* [v. *Square D Co.*], 960 F.2d [239,] 246 [(1st Cir. 1992)] ("[A] continuance is often ineffectual as a sanction and unfair to both the court and the opposing party.").

Licciardi, 140 F.3d at 366. We found no practical way for the plaintiff to remedy the surprise; any solution would have prejudiced the plaintiff even more. *Id.* at 366. We thought it important to consider the policy behind the discovery rules. Directly contrary to this policy, granting a continuance, we found, would create greater incentives for attorneys to violate Rule 26(e). *Id.*; *see also National Hockey League*, 427 U.S. at 643 (Strict sanctions are necessary "to deter those who might be tempted to such conduct in the absence of such a deterrent."). "Such conduct should not be rewarded." *Licciardi*, 140 F.3d at 367. And as we also noted in *Thibeault*: "If continuances were granted as a matter of course for violations of Rule 26(e), the rule could always be disregarded with impunity." *Thibeault*, 960 F.2d at 246; *see also Freund*, 956 F.2d at 359.

We think this rationale applies with equal force to the instant case. We fail to see how a continuance could have accomplished anything in this case. As plaintiff's counsel pointed out orally at the hearing on the admissibility of

the letters, the only thing she could have done was to take the deposition of Dr. Klonoski's sister-in-law to find out as much as she could about the letters. Because of the distances involved and the language problems, this would have necessitated a lengthy continuance. A continuance was not a practical alternative.

Moreover, short of a new trial, a continuance would have accomplished nothing at all to mitigate the prejudice caused to plaintiff's case by defendants' having waited until *after* Dr. Klonoski had finished his direct testimony before disclosing the letters to the plaintiffs. As noted *supra*, defense counsel knew about the letters prior to Dr. Klonoski's testimony. If counsel had notified the plaintiff at that point, then perhaps a continuance might have been the appropriate remedy.

A continuance would have been an inadequate remedy in this case also because of the policy concerns regarding incentives for parties to comply with discovery rules. *See National Hockey League*, 427 U.S. at 643 (Absent strict sanctions, "other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts."). As plaintiff's counsel told the district court, if we were to condone the procedure followed by the defendants in this case, then "what everyone would do in order to avoid the necessity of disclosing materials that are particularly good for ambushing the other side is not do their investigation until the time of trial."

IS A NEW TRIAL REQUIRED?

Finally, the defendants argue that, even if the district court erred by admitting the letter excerpts into evidence and allowing the defendants to use them in cross-examining Dr. Klonoski, a new trial is not warranted because the letter excerpts could have had no effect on the jury's verdict of no liability. Their contention can be summarized as follows. In his jury instructions, the dis-

trict court judge told the jury to consider the letter excerpts only in its determination of hedonic damages. Because the jury found that the defendants were not liable, it never reached the damages issue. Therefore, the admission of the letter excerpts were, at the most, harmless error.

This argument has surface appeal but we reject it. We note that the cases cited by defendants in support of their position are not cases involving the breach of discovery orders and the discovery rules. Defendants' precedential support consists of cases that focus on the judge's instructions after the admission or exclusion of evidence. *See Navarro de Cosme* v. *Hospital Paria*, 922 F.2d 926 (1st Cir. 1991).

Where there has been, as there was here, an egregious breach of discovery orders and the discovery rules, we think that the controlling cases is *Anderson* v. *Cryovac, Inc.*, 862 F.2d 910 (1st Cir. 1988). The plaintiffs in *Anderson* sued for personal injuries allegedly sustained because of toxic contamination to water wells. The jury found that the defendants were not responsible for the pollution. Shortly after the trial, the plaintiffs learned that the defendants had failed to disclose a groundwater study during pretrial discovery. *Id.* at 922. The plaintiffs moved to set aside the judgment under Fed. R. Civ. P. 60(b). *Id.* at 923. The district court denied the motion because the "plaintiffs had not been prevented from fully and fairly presenting their case." *Id.*

We reviewed the district court's ruling for abuse of discretion. We noted that under Fed. R. Civ. P. 60(b), "the court may relieve a party . . . from a final judgment, order, or proceeding for . . . (3) fraud . . . (4) misrepresentation, or other *misconduct* of an adverse party." Fed. R. Civ. P. 60(b) (emphasis added). We held that the "[f]ailure to disclose or produce materials requested in discovery can constitute 'misconduct' within the purview of

this subsection." *Anderson* at 923 (citing *Rozier* v. *Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978)).

We defined misconduct as follows:

> "Misconduct" does not demand proof of nefarious intent or purpose as a prerequisite to redress. For the term to have meaning in the Rule 60(b)(3) context, it must differ from both "fraud" and "misrepresentation." Definition of this difference requires us to take an expansive view of "misconduct." The term can cover even accidental omissions—elsewise it would be pleonastic, because "fraud" and "misrepresentation" would likely subsume it. *Cf. United States* v. *One Douglas A-26B Aircraft*, 662 F.2d 1372, 1374-75 n.6 (11th Cir. 1981) (to avoid redundancy, "misrepresentation" in Rule 60(b)(3) must encompass more than false statements made with intent to deceive). We think such a construction not overly harsh; it takes scant imagination to conjure up discovery responses which, though made in good faith, are so ineptly researched or lackadaisical that they deny the opposing party a fair trial. Accidents—at least avoidable ones—should not be immune from the reach of the rule. Thus, we find ourselves in agreement with the Fifth Circuit that, depending upon the circumstances, relief on the ground of misconduct may be justified "whether there was evil, innocent or careless, purpose." *Bros Inc.* v. *W. E. Grace Mfg. Co.*, 351 F.2d 208, 211 (5th Cir. 1965), *cert. denied*, 383 U.S. 936, 86 S. Ct. 1065, 15 L. Ed. 2d 852 (1966).

Id. at 923.

Anderson holds that any "uncertainties attending the application of hindsight in this area" should favor the party that was denied discovery because "parties ought not to benefit from their own mis-, mal-, or nonfeasance." 862 F.2d at 924.

We concluded:

> To summarize, in motions for a new trial under the misconduct prong of Rule 60(b)(3), the movant must show the opponent's misconduct by clear and convincing evidence. Next, the moving party must show that the misconduct substantially interfered with its ability fully and fairly to prepare for, and proceed at, trial. This burden may be shouldered either by establishing the material's likely worth as trial evidence or by elucidating its value as a tool for obtaining meaningful discovery. The burden can also be met by presumption or inference, if the movant can successfully demonstrate that the misconduct was knowing or deliberate. Once a presumption of substantial interference arises, it can alone carry the day, unless defeated by a clear and convincing demonstration that the consequences of the misconduct were nugacious. *Alternatively, if unaided by a presumption—that is, if the movant is unable to prove that the misconduct was knowing or deliberate—it may still prevail as long as it proves by a preponderance of the evidence that the nondisclosure worked some substantial interference with the full and fair preparation or presentation of the case.*

Id. at 926 (emphasis added).

We think this case falls well within the parameters of *Anderson*. As already noted, there was, intentional or otherwise, an egregious breach of the discovery orders and the discovery rules which resulted in "substantial interference with the full and fair preparation" of plaintiff's case. We cannot know with certainty what impact the letter excerpts had on the jury, but to dismiss what happened as harmless error would render the discovery rules and orders issued thereunder useless. Moreover, where, as in this case, undisclosed evidence is introduced at a key point in the trial, it would be unrealistic to say that it had no effect on the jury's determination as to liability. If the jury decided that Dr. Klonoski was a tyrant as a

husband and a liar, his chances of obtaining a favorable and fair verdict were destroyed. We find that the district court erred as a matter of law in allowing the letter excerpts into evidence and, as in *Anderson*, abused its discretion in not granting plaintiff's motion for a new trial.

In *Perez-Perez* v. *Popular Leasing Rental, Inc.*, 993 F.2d 281 (1st Cir. 1993), we applied the *Anderson* misconduct test to a Fed. R. Civ. P. 59 motion for a new trial. Here, the plaintiff sought damages for emotional distress sustained because of her sister's death. She alleged that one defendant drove into the sister while she was walking on the side of the road. During the trial, the plaintiff used a previously-undisclosed expert witness. *Id.* at 286. Prior to trial, the plaintiff never suggested that the defendant's eyesight was at issue. *Id.* During the defendant's direct examination, his lawyer noted he wore glasses and asked one question about them. *Id.* The plaintiff's lawyer focused on the defendant's eyesight during cross-examination. *Id.* Following this testimony, the plaintiff's lawyer sought to introduce an eye doctor as a "rebuttal witness." Despite contacting the doctor four months prior to trial, the plaintiff's lawyer never listed the doctor as a potential witness. *Id.*

In its decision to allow the doctor to testify, the district court stated that "there was 'no excuse as to why [counsel] kept [Dr. Kleins' testimony] under [his] sleeve until this moment;' and . . . the proffered testimony changed the theory of the case." *Id.* at 287 (alterations in original). Noting, however, that this misconduct was not the plaintiff's fault, but rather her counsel's, the district court admitted the testimony as an "act of justice." *Id.*

We found that this decision was an abuse of discretion. In response to the district court's "act of justice" reason for admitting the evidence, we stated that the court

> is aware of the difficulty of excluding highly relevant and perhaps dispositive testimony which apparent substantive justice requires should be considered by

> the jury. Apparent substantive justice may be illusory, however, if the purportedly dispositive evidence is not subject to a fair testing in an even-handed process.

Id. at 287 n.4. Applying the analysis of Fed. R. Civ. P. 59(a) used in *Conway* v. *Chemical Leaman Tank Lines, Inc.*, 687 F.2d 108, 111-12 (5th Cir. 1982), the *Perez-Perez* panel found that the undisclosed eye doctor "exactly comports with" the Fifth Circuit's definition of "unfair surprise" and prejudiced the defendants' case.[11] *Id.* at 287. Because the doctor's testimony introduced a "novel theory of liability," defense counsel could not "design an intelligent litigation strategy to address the charge of visual impairment and . . . effectively cross-examine [him]." *Id.* In addition, we found that the criteria for "misconduct" set forth in *Anderson* "apply equally to this motion under Rule 59." *Id.* at 288.

The same reasoning applies to the case before us. We conclude that the district court's error in admitting Mrs. Klonoski's letters was prejudicial, not harmless.

CONCLUSION

We find that the district court abused its discretion in allowing the excerpts from the letters in evidence. There was a clear violation of the court's pretrial discovery orders and the requirements of the discovery rules. It follows that the court also abused its discretion in denying plaintiff's motion for a new trial.

In fairness to the district court, we must explain that our findings of abuse of discretion were not based on any

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[11] In *Conway*, the Fifth Circuit affirmed the grant of a new trial under Rule 59(a), because the plaintiff had "been unfairly made the victim of surprise," in that the defendant had called a previously undisclosed expert witness. 687 F.2d at 109-11. The appeals court rejected the defendant's argument that the proper remedy was a continuance.

arbitrary refusal by the court to require compliance with its pretrial orders and the discovery rules. Rather, the court's findings stemmed from its legally incorrect ruling that the letters fell within the impeachment exception of Fed. R. Civ. P. 26(a)(3). This does not mean that there was no abuse of discretion. As the Supreme Court has stated, "[a] district court by definition abuses its discretion when it makes an error of law." *Koon* v. *United States*, 518 U.S. 81, 94-102 (1996); *see United States* v. *Marroquin*, 136 F.3d 220, 223 (1st Cir. 1998); *Golas* v. *HomeView, Inc.*, 106 F.3d 1, 3 (1st Cir. 1997).

We vacate the judgment below and remand for a new trial. Costs on appeal awarded to appellant.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 97-1976

RICHARD F. KLONOSKI, M.D., ETC., *et al.*,
Plaintiffs Appellants,

v.

BENJAMIN MAHLAB, M.D., *et al.*,
Defendants, Appellees.

Before

Torruella, *Chief Judge*
Bownes, *Senior Circuit Judge*,
Selya, Boudin, Stahl, * and Lipez, *Circuit Judges.*

ORDER OF COURT

Entered: October 26, 1998

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

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* Judge Sandra Lynch has recused herself in this matter.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

PHOEBE MORSE
Clerk

By /s/ Janice M. O'Neil
Chief Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Civil Action No. 95-C-153-M

RICHARD F. KLONOSKI, Individually and in his Capacity as Administrator of the Estate of JOLANTA K. KLONOSKI; BRIAN KLONOSKI, through his Father and Next of Kin, Richard F. Klonoski; KARINA KLONOSKI, through her Father and Next of Kin, Richard F. Klonoski; CAROLINE KLONOSKI, through her Father and Next of Kin, Richard F. Klonoski,

Plaintiffs,

v.

BENJAMIN MAHLAB, M.D.; ERIC SAILER, M.D.; MARY HITCHCOCK MEMORIAL HOSPITAL, INC.; HITCHCOCK CLINIC INC.,

Defendants.

PLAINTIFFS' MOTION TO EXCLUDE AND STRIKE ALL REFERENCES TO LETTERS OF JOLANTA KLONOSKI

Plaintiffs respectfully request pursuant to Rules 26 and 37 of the Federal Rules of Civil Procedure and this Court's previous Order of July 16, 1996, as well as New Hampshire's Marital Privilege and the Federal Rules of Evidence, that the Court exclude from evidence, and strike all previous references to, any letters of the decedent, Jolanta Klonoski, and any other materials which were not disclosed by the Defendants prior to the afternoon of Friday, January 31, 1997 during trial.

Motion Granted in Part and Denied in Part (See transcript 3 Feb. 97).

/s/ Steven J. McAuliffe
U.S. District Judge
Feb 3, 1997

APPENDIX D

[Filed May 5, 1997]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Civil No. 95-153-M

ESTATE OF JOLANTA K. KLONOSKI,
Plaintiff,

v.

BENJAMIN MAHLAB, M.D.;
HITCHCOCK CLINIC, INC.; and
MARY HITCHCOCK MEMORIAL HOSPITAL, INC.,
Defendants.

ORDER

This medical malpractice case arises from Jolanta Klonoski's death while a maternity patient at the Dartmouth-Hitchcock Medical Center in Hanover, New Hampshire. Jurisdiction is based upon diversity of citizenship.

The case was tried to a jury, and a verdict was returned in favor of the defendants. The plaintiff estate now moves for a new trial (document no. 136) under Federal Rule of Civil Procedure 59, asserting two basic grounds. First, plaintiff says the jury's verdict was against the clear weight of the evidence. Second, plaintiff says the interests of justice warrant a new trial because particular evidence presented to the jury was unfairly prejudicial.

I. Is the verdict against the clear weight of evidence?

Had this been a bench trial, the court would have reached a conclusion different from that represented by the jury's verdict. But the case was not tried to the court, and, in the end, defendants are quite right in saying that the critical fact issues turned on conflicting medical opinion evidence. The critical issues, for purposes of the pending motion, were not whether the treating physician, Dr. Mahlab, met the applicable standard of care in all respects (defendants conceded that he did not), or whether some of the attending nurses behaved unprofessionally and inappropriately when, despite their belief that Mrs. Klonoski was severely preeclamptic, in dire straits, and not receiving adequate medical care from Dr. Mahlab, they inexplicably failed to seek help from a supervising physician designated by hospital policy to assist in precisely that type of situation. (Though not conceded by defense counsel, it is apparent to the court that, in general, the nurses attending Mrs. Klonoski did not act either professionally or in her best interests.)

Rather, the critical fact issues were whether Mrs. Klonoski's intercerebral hemorrhage, the cause of her death, was the result of a preeclamptic hypertensive bleed substantially caused by inadequate medical care, or the result of an unanticipated arteriovenous malformation ("AVM") rupture. And, if the death was the result of an AVM rupture, whether Dr. Mahlab's failure to adequately treat Mrs. Klonoski's preeclampsia substantially caused or contributed to cause either the AVM rupture itself, or the fatal extent of her subsequent brain hemorrhage.

"Proof of causation is . . . more difficult in a medical malpractice case than in a routine tort case because a jury must often grapple with scientific processes that are unfamiliar and involve inherent uncertainty." *Lama v. Borras*, 16 F.3d 473, 478 (1st Cir. 1994). Proof of causation in this case was essentially analytical in nature; the

jury was particularly dependent upon expert opinion testimony in resolving the medical fact issues. Both parties presented very highly qualified, experienced, and knowledgeable medical experts—experts who fundamentally disagreed as to the cause of death, but who generally agreed that their opinions necessarily derived from analytical judgments regarding medical probabilities, and that no one could say for certain what caused Mrs. Klonoski's death.[1]

The jury apparently chose to believe that defendants' experts were more likely correct in concluding that Mrs. Klonoski's death resulted from an unanticipated AVM rupture, either coincidentally or due to the stresses of pregnancy itself, but not due to any deficiency in Dr. Mahlab's medical treatment of her preeclampsia. Or, perhaps the jury determined that notwithstanding some relationship between Mahlab's malpractice and the extent of the AVM bleed—the bleed would have occurred and its size would have been fatal even absent additional bleeding caused by Dr. Mahlab's malpractice. Of course, the jury also could have decided that the medical experts' disagreement established, if anything, that both plaintiff's and defendants' causal theories were equally plausible and, thus, plaintiff failed to meet its burden of persuasion on causation.

As noted, the court would have decided the medical fact issues differently, but the court is in no better position than the jury to decide those open and contested fact issues. This is not a case in which the evidence, particularly in light of the opposing medical opinions, resoundingly favored one side or the other. One's view of the evidence as a whole necessarily turns upon one's assessment of the credibility, reliability, and persuasiveness of the medical experts, and that function is well suited to a jury's collective wisdom and judgment.

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[1] Because no autopsy was performed there was no conclusive evidence of the existence or absence of a ruptured AVM.

The court cannot in good conscience say that the verdict was against the great weight of the credible evidence presented, or that the jury was seriously mistaken to the extent it found the opposing medical experts equally credible, or found defendants' experts more credible. While a judge's discretion to order a new trial was at one time considered virtually unlimited, and is still sometimes referred to as "great," in reality the exercise of that discretion has limits —it "must be exercised with due regard to the rights of both parties to have questions which are fairly open resolved finally by the jury at a single trial." *Coffran v. Hitchcock Clinic, Inc.*, 683 F.2d 5, 6 (1st Cir. 1982) (citations and explanatory footnote omitted). The critical liability questions in this case were "fairly open."

Recognizing that "the [trial] judge's duty is to exercise a more limited discretion" and he or she "should not interfere with the verdict 'unless it is quite clear that the jury has reached a seriously erroneous result,'" I must deny the motion for new trial. *Coffran*, 683 F.2d at 6 (quoting *Borras v. Sea-Land Serv. Inc.*, 586 F.2d 881, 887 (1st Cir. 1978)). I cannot say on this record that the verdict was against the clear weight of the evidence, though I do disagree with the verdict.[2] *See Coffran*, 683 F.2d at 6

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[2] Plaintiff also seems to argue, without much elaboration or reference to any legal authority, that the jury's verdict surely must be seen as against the clear weight of the evidence at least to the extent that Dr. Mahlab's conceded breaches of duty necessarily caused *some* compensable pain and suffering, or prolongation of pain and suffering (related to decedent's mistreated severe preeclampsia) that otherwise would not have occurred had he provided adequate care. Although the issue was not raised by plaintiff before or during trial, and has not been adequately briefed by plaintiff now, the short answer would seem to be that "[a]t common law there was no action for wrongful death nor did tort actions for [personal] injuries survive." *Costoras v. Noel*, 101 N.H. 71 (1957) (citations omitted). Therefore, if plaintiff is claiming that the verdict is against the weight of the evidence because the evidence unquestionably established breaches of duty by Dr. Mahlab which

(trial judge should not set a verdict aside just because he or she would have reached a different result in a bench trial); *Freeman v. Package Machinery Co.*, 865 F.2d 1331, 1334 (1st Cir. 1988) ("If the weight of the evidence is not grotesquely lopsided, it is irrelevant that the judge, were he sitting jury-waived, would likely have found the other way."); *Milone v. Moceri Family, Inc.*, 847 F.2d 35, 37 (1st Cir. 1988) ("[A] trial judge cannot displace a jury's verdict merely because he disagrees with it or would have found otherwise in a bench trial.").

II. The Interest of Justice

Plaintiff raises several arguments under this heading, but they too are unavailing. Taking the points in order, the court rules as follows.

A. Duration of Jury Deliberation

The court is not persuaded that the jury's deliberation was inappropriately short, or that the two plus hours of deliberation necessarily indicates, much less establishes, that the jury failed to follow the court's instructions. The jury heard a great deal of testimony but, as discussed above, the causation issue was critical. The jury could easily have focused on that issue first, determining after a short while that it was in agreement with defendants' experts. Or, it could have agreed that, given the plausible medical opinions on each side, plaintiff simply did not meet its burden of proof on causation.

B. Undisclosed Marital Evidence

Decedent's husband, Dr. Richard Klonoski, took the stand to testify that while his marriage had not been per-

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proximately caused personal injury to Mrs. Klonoski before her death in the nature of unnecessary pain and suffering related to preeclampsia, that tort claim did not survive Mrs. Klonoski's death. (The wrongful death claim, however, is statutorily allowed.)

fect, it had been, overall, a strong, healthy and happy one, and would likely have continued to be strong into the future. Plaintiff also introduced family photographs and a brief family video to support that contention. The video, redacted in part after court review, depicted a recent family wedding, just before Mrs. Klonoski died, at which Dr. and Mrs. Klonoski were shown in church and later dancing together at the reception.

This evidence was offered by plaintiff on the issue of hedonic damages—fair compensation for Mrs. Klonoski's loss of enjoyment of life. Without belaboring the record discussions on this issue, the court admitted the evidence for that limited purpose and fairly advised plaintiff's counsel that contradictory evidence—to show that the marriage was not all that wonderful—would also be admissible on hedonic damages.

Defendants' counsel represented to the court, on the record, that only after trial started did they discover and obtain copies of letters that were written by the decedent, close to the time of her death, that dramatically contradicted Dr. Klonoski's testimony about the marriage. Investigators hired by defendants in Poland (Mrs. Klonoski's country of birth) obtained the letters from Mrs. Klonoski's sister, Marta. The copies were faxed to New Hampshire and translated while Dr. Klonoski was testifying. The letters, in their entirety, were quite contradictory —painting an entirely different picture of the Klonoski marriage than Dr. Klonoski had described.

The court asked plaintiff's counsel if she wished a continuance to respond to this late discovered evidence, but she declined. Defendants were allowed to use only very limited excerpts from the letters to cross-examine Dr. Klonoski. That is, the court identified specific statements in the letters that directly contradicted his testimony, but precluded use of most of the contents on grounds that the sentiments expressed and language used might prove un-

fairly distracting. Several times during the trial the court told both counsel that they seemed to be making much over a relatively small matter—whether the marriage was happy or unhappy would seem to say comparatively little about the decedent's *future* loss of enjoyment of life. But, *both* parties pursued the matter anyway under the guise of hedonic damages, plaintiff perhaps to engender some collateral sympathy and defendants to perhaps engender some collateral animosity. So, the court took the added precaution of carefully explaining to the jury the very limited purpose of that evidence, giving the following pointed instruction after closing arguments (which the jury had in writing as well):

> B. Damages to the Estate of Jolanta Klonoski
>
> 1. Calculation of Damages
>
> In determining the amount to award as damages to the Estate of Jolanta Klonoski, you may consider the following items of loss or harm:
>
> * * *
>
> 4. Reasonable compensation for Jolanta Klonoski's loss of enjoyment of life—past and future.
>
> Ladies and gentlemen, as to this last item—loss of enjoyment of life, you have heard a fair amount of evidence related to alleged discord in the Klonoski marriage, and I want to make sure you understand what that evidence is relevant to, and what it is not relevant to—it is relevant only on the issue of damages, and even then, only in a limited way. You should keep in mind that under applicable New Hampshire law, a cause of action (or a claim) based on someone's allegedly wrongful death belongs to the decedent's estate, and does not belong to the decedent's surviving spouse or surviving children. So, in this case, if you find legal fault and are consider-

> ing damages, the damages you award for Mrs. Klonoski's wrongful death are awarded to her estate. As I have instructed you, one among other factors you may consider in determining a proper award would be Mrs. Klonoski's loss of enjoyment of life, factor number 4 mentioned above. It is of course, *Mrs. Klonoski's* loss of enjoyment of life that you will be considering, not Dr. Klonoski's loss of enjoyment of life, and not their children's loss of enjoyment of life. Dr. Klonoski and the Klonoski children have no claims pending before you, and you must not award damages to them.
>
> Now, to the extent you find, based on the evidence, that there was discord in her marriage you may take that into account and may give it such weight as you deem appropriate in fairly assessing the effect of marital discord on the loss of enjoyment of life Mrs. Klonoski suffered as part of your determination of a ful and fair compensatory award. On the verdict form that you will be provided, I will ask you to break out, or designate, that part of any total compensatory award that represents the amount, if any, awarded for loss of enjoyment of life.

The court is satisfied that the jury fully understood and followed its instructions regarding the "marital discord" evidence.

Plaintiff's counsel suggests that had she known Mrs. Klonoski's letters existed and were so patently inconsistent with Dr. Klonoski's more favorable perceptions of the marriage, her trial strategy would have been different. But, she also says, as Dr. Klonoski said to the jury upon being recalled, his different perceptions were honestly held. The jury could certainly appreciate the apparent difference in perception between Dr. and Mrs. Klonoski, and could have easily put the "marital discord" evidence in proper perspective had it reached the issue of hedonic damages.

The important points here are that the letters were in fact late discovered (nothing to the contrary has been shown); it was not unfair to permit defendants to use limited excerpts to cross-examine Dr. Klonoski about the marriage (to the extent that mattered in awarding hedonic damages), particularly given his own dramatic statements and video evidence on direct; the evidence was relevant to damages but only in a limited way; the jury never reached the damages issue; and, the jury was carefully instructed on the limited relevance of the "marital discord" evidence.

Under these circumstances, the court cannot conclude that the jurors returned a defendants' verdict because they were blindly prejudiced against Mrs. Klonoski's estate by her own negative comments about the quality of her marriage. The jurors may well have looked less favorably on Dr. Klonoski after the letters were brought to light, and his credibility in other respects might or might not have suffered, but *he* had no claim pending before the jury, and that fact was made very clear to the jury.

C. The Headache Evidence

Both sides presented evidence tending to show that Mrs. Klonoski suffered from headaches during the later stages of her pregnancy. Defendants also presented witnesses who said Dr. Klonoski was aware of those headaches.

Plaintiff apparently wanted to show that Dr. Sailer (an original defendant who provided prenatal care) should have recorded those headaches in Mrs. Klonoski's medical records, and that, had he done so, Dr. Mahlab would likely have diagnosed the later preeclampsia in a timely fashion. Defendants, on the other hand, wanted to show that Mrs. Klonoski did have headaches, that they were increasingly severe and frequent, and they were consistent with a subsequent AVM rupture.

Plaintiff seems to argue in its motion for new trial that the testimony regarding Dr. Klonoski's knowledge of Mrs.

Klonoski's headaches was improperly admitted, and worse, was relied upon by defense counsel to subtly argue in closing that Dr. Klonoski was "contributorily negligent" in some manner (New Hampshire is a comparative fault state).

Plaintiff's counsel did not timely object to defense counsel's closing argument, so the issue is waived. But putting waiver aside for discussion purposes, headache evidence was offered by defendants to show that their AVM hypothesis was both supportable and supported. Defendants properly tried to prove that Mrs. Klonoski suffered from increasingly severe and frequent headaches, and that those headaches were symptoms consistent with "warning bleeds" that sometime precede an AVM rupture. The defendants' points were that an AVM rupture occurred, and, had they been told early on of the increasingly severe and frequent headaches, the course of Mrs. Klonoski's medical treatment might have differed—perhaps testing for a possible AVM might have been done, and, if an AVM had been found, perhaps an alternative delivery method would have been used in an effort to avoid an AVM rupture, or perhaps corrective surgery would have been recommended prior to decedent's giving birth. In short, Mrs. Klonoski's death in childbirth might have been averted. Defendants also suggested, properly, that perhaps the reason they were not told of the headaches was that neither Dr. Klonoski, who was aware of them, nor Mrs. Klonoski thought they were significant or unusual.

In any event, defense counsel did not argue "contributory negligence" in closing, and the evidence of Mrs. Klonoski's awareness of her headaches was properly admitted and was not unfairly prejudicial such that a new trial is warranted.

D. The Testimony of the Nurses

Virtually all of the nurses employed by Dartmouth Hitchcock Medical Center who were called to testify claimed varying degrees of forgetfulness regarding the relevant facts and circumstances surrounding Mrs. Klonoski's hospitalization and death. Excepting Nurse Bowers, the court perceived the nurses' trial testimony to be generally evasive, obfuscating, unreliable, and not credible. For reasons discussed in earlier orders in this case relative to privilege, and on the record at trial, the court permitted plaintiff's counsel to deal with this collective forgetfulness by introducing as full exhibits the comprehensive statements each nurse gave to the hospital's claims adjustor, Mr. Burke, as recorded by Burke during interviews he conducted shortly after Mrs. Klonoski's death.

Plaintiff argues for a new trial on grounds that the nurses' suspect trial testimony (presumably their claimed lack of memory) so unfairly prejudiced plaintiff's case as to warrant a new trial. In the court's view, the nurses' assertions of memory failure were indeed highly dubious. But, if they *had* remembered all that they once knew, it is unlikely that they would have had anything of a substantive nature to say at trial beyond what they said to Burke, the medical center's claims adjustor. The statements given to Burke were also likely to have been full and candid, for the nurses undoubtedly recognized at the time that the hospital was attempting to determine exactly what had happened in order to protect against avoidable errors in the future. The statements themselves reveal that the nurses held, and freely expressed, very strong impressions and opinions about what had gone wrong and why. The statements were taken by Burke when memories were fresh and details were clear; certainly the statements give the impression of complete candor. Burke was also revealed, by plaintiff's counsel, to be an experienced and thorough investigator who at the time was acting on behalf of the medical center and hospital, the nurses' employer.

Plaintiff makes no proffer regarding what information any of the nurses might have offered, beyond what was contained in Burke's recordings, if their memories had been intact at trial. The nurses' full statements to Burke were not only allowed into evidence, but plaintiff's counsel was given wide lattitude in using them. She was permitted to read extensively from them, and she freely confronted the nurses, Burke, Dr. Mahlab, and other witnesses with them. It is difficult to see what more could have been done to overcome any possible prejudice from the nurses' claimed lack of memory and to reveal the facts to the jury as the nurses remembered them at the relevant time. A new trial is not warranted on this ground, at least not as described, asserted, or supported by plaintiff in its motion.

Conclusion

For the reasons discussed, the court declines to exercise its discretion to grant a new trial on the grounds asserted. Plaintiff's motion for new trial (document no. 136) is denied.

So ORDERED.

/s/ Steven J. McAuliffe
STEVEN J. MCAULIFFE
United States District Judge

May 5, 1997

APPENDIX E

**[Excerpts of Trial Transcript
(February 2, 1997)]**

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[155] MR.BASSETT: I'm going to show you a document that I'm going to mark for identification, please. I've lost track of where we are on the list now.

MS. LUKEY: Your Honor, may we have a side bar?

AT SIDE BAR

MS. LUKEY: I don't have a clue what this is, but it's never been produced in discovery, and there is absolutely no question that we requested anything that they intend to use in this case. I have no idea where it came from or what it might be. And I assume it's in Polish, so I can't read it, but really this is unfair.

THE COURT: What is it?

[156] MR. BASSETT: It's impeachment. This is a letter written by Mrs. Klonoski to her sister Marta in Poland. And this letter happens to have been written in late April of 1993 and early May of 1993, and it contains in it a description of a number of things, most prominently the marital relationship and the significant problems that Mrs. Klonoski believed existed at that time, and I don't believe—we actually just got that letter last night.

MS.LUKEY: Your Honor, we had, as you recall, a court-ordered disclosure from them pertaining to anything to do with alleged marital discord. This was not disclosed to us. I don't know where it came from. I don't know what he's doing, but it obviously doesn't give me the opportunity to speak, for example, to his sister—her sister, if that's the recipient. I really think this is litigation by ambush and totally inappropriate. This is a situation with an actual court order.

MR. BASSETT: Your Honor, it's legitimate cross-examination. We just got that last night based on the testimony that we had heard in this case, and it's legitimate cross-examination. We are not required to disclose what we are going to use on cross-examination. We specifically brought it up with [157] the Court, and you said for impeachment and credibility, we did not have to disclose it, and we didn't have it until last night. But in any event, we want to use it for that purpose, and I think Attorney Lukey is entitled to go into those issues on reexamination.

MS. LUKEY: Your Honor, he may not have to disclose it on a trial exhibit list, but in discovery he certainly has to disclose it if he has knowledge of it, and we actually had to get a court order to get their evidence on marital discord. That was the reason we asked for it.

THE COURT: But he didn't have it.

MR. BASSETT: Didn't have it until last night.

MS. LUKEY: He should have had it, and what is it that they're contending justifies ambushing us with it at this moment in time.

MR. BASSETT: This is not an ambush, your Honor. This is legitimate cross-examination. The man—

BEFORE THE JURY

THE COURT: Ladies and gentlemen, this is going to take another five or ten minutes. I think I'll excuse you to the jury room so that we can [158] discuss it freely. Thank you.

(Jury left.)

MR. BASSETT: We, frankly, haven't had the entire thing translated yet because it was received—this one was received this morning actually. All we have had is a skeletal translation of it, your Honor, but I think at this point

it's an admission by a party opponent. It's her letter, and that's how it would come into evidence.

THE COURT: What does it say?

MR. BASSETT: Well, it says quite a few things. He can translate it for us.

THE COURT: I can't determine the relevance of "quite a few things." That's not relevant.

MR. BASSETT: I'll read you my understanding of it, but it's—this is the last letter from Jola. This is a paraphrasing of it right now, your Honor. We would ask him to read it because he can read Polish and he can translate it.

She goes on to the subject of his—of the pregnancy: I'm afraid of what's going to happen. He cares only about his career. I was surprised by his announcement that he was leaving for California and for a business trip.

[159] There are problems with her spending habits. He doesn't like it. I bought a baby stroller, and he screamed at the top of his lungs. I think we should get a divorce.

She mentions that Richard is working so hard to become a cardiologist. She doesn't say her situation will improve directly, but intimation is she has a stake—I don't understand what all that is. I don't, frankly, know what everything is in there, but just the fact that she says she thinks we should get a divorce is enough, your Honor. And he can translate it.

And it's an admission. All the reasons that got the Burke notes in, your Honor, the same analysis under 801(d)(2) applies to this. This is a party-opponent admission. And just as we're entitled to make the arguments that outweigh it, so, too, Attorney Lukey can.

There are three more—four more of those. That's the first of the ones that I intend to offer in evidence.

MS. LUKEY: I would like to know how long they've known of the existence of these letters regardless of when they may have received this one.

MR. BASSETT: I'll make a representation of [160] that.

THE COURT: How long have you known?

MR. BASSETT: We've known about them, it's no more than two days. We received the first of them—

THE COURT: No, no.

MS. LUKEY: How did you know they were there?

MR. BASSETT: We found Marta this week. We found her three days ago. We looked for her father.

MS. LUKEY: He's dead.

MR. BASSETT: And he's dead; that's right. He died last winter. That's who we were trying to find. Instead we found Marta this week, and I can certainly get somebody to prepare an affidavit to say that she was not spoken to until two days ago, and in fact we didn't get the first transcript of these letters until yesterday afternoon. They were faxed from Poland last night. The meeting with Marta took place last night in Poland. They were faxed to us, and I spent most of the night up with these letters, and translators spent most of the night with the letters, too. We have the other letters translated. This one we just received within two hours. So we haven't had it fully translated.

[161] MS. LUKEY: I have a serious issue with this, your Honor. It's a little bit like springing Dawn Rafferty on us right after Christmas when she turns out to be Linda Bowers' niece, and they've known about her right along. There's nothing that I heard to suggest this is not something they could have determined earlier if they intended to use it. This is truly an ambush. They knew about her sister. That's not new. I don't know what it is

they think is new about this. But the fact that they choose to wait until three and a half weeks into a trial and then spring it on us as purported impeachment I find extremely troubling and inconsistent with the rules.

I also have a very strong suspicion that the reason that they made a point with you in our pretrial conference some months ago of saying we don't have to show any impeachment, right, is because they knew exactly what they intended to do.

I don't know what Jola wrote, and it's clear that Dr. Klonoski doesn't know what Jola wrote. I find it very upsetting and extremely inconsistent with the open disclosure rules of current litigation that this would occur. This is the kind of thing that occurred 25 years ago and was the whole reason the Rules of Civil Procedure were adopted. I mean I've [162] built a whole case obviously, and they're suddenly coming in and trying to spring something on me about what the wife supposedly felt. She's dead. I can't ask her.

But I do not feel this is appropriate. I have heard nothing from Mr. Bassett that suggests why he couldn't have come up with this earlier if it was something they intended to use. You don't keep investigating the case when the trial is in process.

MR. BASSETT: Yes, you do.

THE COURT: A lot of people do.

MS. LUKEY: But it's inappropriate.

MR. BASSETT: Based on the type of testimony we got in this case—

MS. LUKEY: What in this case has justified this that you didn't know before?

MR. BASSETT: We couldn't find them, and we found them now, your Honor.

MS. LUKEY: All you had to do was ask for the address.

MR. BASSETT: This testimony is not much different —I mean it's much better because it's from her, and it is —it's a party admission and it addresses many of the concerns.

As Ms. Lukey says, she's going to attack one [163] of the witnesses this afternoon, Dawn Raftery, who says essentially what these letters say on the basis that she's a shell for us. And obviously that's not what Mrs. Klonoski was, but she was writing these letters to her family, who she obviously cared very much about.

And this tells it straight, your Honor. And she can cross—she can talk to Dr. Klonoski about it, but that's—that's what is allowed under 801(d)(2), admission by a party opponent, and we have a case—cases cited that the estate is the successor for the purpose of the party opponent, and I have cases for that.

MS. LUKEY: Your Honor, my problem is the method that they've done this.

THE COURT: Your problem is you don't accept that they just knew about it. I do accept that they did just find out as he's represented to me.

MS. LUKEY: It isn't just whether they just knew about it. You're right. I do not believe that they just found out about it. You're absolutely correct.

But quite apart from that is the fact that what one is supposed to do is to do one's discovery and so forth for trial by the discovery disclosure [164] date in order to ensure under the Rules of Civil Procedure, the information you come up with is shared if appropriately requested by the other party. In this case it was not only requested, we had to get a court order. We got the court order regarding all evidence they had on the subject of alleged marital discord.

MR. BASSETT: That was to identify the witnesses.

THE COURT: Take the next step. Then you have all the evidence they had on marital discord.

MS. LUKEY: And, frankly, that evidence doesn't trouble me. Then they come up with this.

THE COURT: That's a different test.

MS. LUKEY: I understand, your Honor. My point is if it were in fact the case that it was okay to send your investigator out while the trial was in progress, what everyone would do in order to avoid the necessity of disclosing materials that are particularly good for ambushing the other side is not do their investigation until the time of trial.

THE COURT: Well, I hear you, but I don't agree with you. You took the initiative to put on the evidence of a good marriage, stable marriage. Everything's hunky-dory and wonderful.

[165] MS. LUKEY: As far as he knew.

THE COURT: Well, as far as he knew. But to the extent that's relevant, I've already—my view, I don't think it's particularly relevant one way or the other. But both of you think it is, and once you do that, they have a right to then challenge whether that was the case. If they just got this and they're going to use it for impeachment, I think they have a right to do it.

MS. LUKEY: Do we get a limiting instruction?

MR. BASSETT: Not just for impeachment because under 801(d)(2), it's totally admissible. Just like you ruled on Mr. Burke, it comes in in its entirety for its purpose, and Attorney Lukey can argue—

MS. LUKEY: Can I have copies of all the letters now?

THE COURT: It comes in on the issue of hedonic damages. Both of you seem to feel that apparently the marriage stability issue is reflective of hedonic damages.

MR. BASSETT: And it also goes to credibility given what the doctor's testified about.

MS. LUKEY: Note my objection. Can I have copies?

THE COURT: Yes. Obviously you're not going to make representations as to what's in here unless the doctor translates it for you.

MR. BASSETT: Not today. He can read it, and I think he can read it. But if he won't, then we can bring a translator in.

THE COURT: Okay.

MR. BASSETT: Your Honor, if they want copies, I can give it to them. It's just going to take a second because I had them in a different order if you want that to happen.

THE COURT: Well, if you like, I'll note your objection and overrule it now, so you don't have to do it in front of the jury.

MS. LUKEY: That's fine, your Honor, if you can do that, but I would like to get copies of them, not that I can read them myself, mind you, but—

THE COURT: All right. I'll allow their use, Mr. Bassett. They'll be admissible under Rule 801(d)(2).

MS. LUKEY: Your Honor, there's one other issue that I think—

THE COURT: Not yet.

MS. LUKEY: There is one other issue that I [167] think—I'm a little troubled about here that I would raise to you. This doesn't give me the opportunity to find out from the sister whether there's more to the story, more letters, another side, an explanation, whatever. I mean I

cannot imagine, short of paying out large sums of money, what would cause a sister to turn over these letters, which has me a bit troubled, and I would like to know if there is more. I can't do that in the middle of trial. I'm about to close in—you know, ten minutes after he finishes his cross.

So I do remind the Court again, he placed me in an impossible position in that regard because I don't know whether there's more out there, another side to the story or some explanation. Nor do I know whether money has changed hands. I don't know anything. I cannot imagine why a sister would turn these over to be used against her sister's estate.

THE COURT: I'm not sure that's relevant. The only question is are they legitimate documents.

MS. LUKEY: But my ability to examine Marta is essentially nonexistent because of the fact that—

THE COURT: Well, I'm not sure Marta makes a difference.

MS. LUKEY: Well, she might make a difference if it turns out that there are other [168] letters, ones that came after, ones that came before, explanatory letters, phone conversations, none of which I can possibly know. I don't know if this is complete. I don't know if—

THE COURT: Are you asking for a continuance?

MS. LUKEY: No, I'm not asking for a continuance. I'm asking to have these documents excluded, your Honor, on the basis that it's litigation by ambush.

THE COURT: Yeah. That objection has been overruled. All right.

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APPENDIX F

**[Excerpts of Trial Transcript
(February 3, 1997)]**

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[46] THE COURT: Mr. Bassett?

MR. BASSETT: Your Honor, let me just try to set forth the chronology a little more clearly. And in fact, Dr. Klonoski sets this forth in an affidavit that he's filed with the court that's in many respects correct.

I can just say in terms of the development of this information, as I represented to the court at sidebar on Friday, we had been looking for—basically, we had been looking for Mrs. Klonoski's father. We really—I guess we're aware of the existence of the sister, but we didn't know about the letters. The letters were never mentioned by Dr. [47] Klonoski at deposition. We had asked for information from the plaintiffs as to people who might have relevant information in the case, and Marta was not identified, even though it's readily apparent that Dr. Klonoski knew about this correspondence relationship that we did not know of until he was on the stand on Thursday.

As stated in the affidavit or the chronology, we first learned that Dr.—that we weren't going to find Mrs. Klonoski's father, and that there was a sister who apparently could be found on Wednesday. That's what we knew at the end of the day on Wednesday.

At the end of the day Thursday, after Dr. Klonoski had already testified about the letters and about his marital relationship—I mean, that all came in on Thursday. As of that point, we had no information other than there was a sister that had been found in Poland.

When we got back to the office on Thursday night, we were told that there were letters. We received the letters that evening at some point, and they went to a translator,

and we did not have the translation until noon. I didn't have a translation, other than a general sense of what the letters might [48] contain, until after the recess at noontime on Friday.

So it wasn't that we were holding anything back. At that point we had received three letters in Polish on Thursday night, at some point, and we had tried to get them to a translator, which I don't know the details of, but that happened at some point Thursday night.

The letter from May of 1993, as I wrote to Attorney Lukey and we had an exchange of correspondence over the weekend about these things, I received that letter by fax on Friday morning as I was coming to court. Again, that was in Polish. I had no idea what it said. And I came to court knowing I had—knowing we had four letters in Polish, having no idea—at that point we didn't even know who they were to or who they were from. We learned that at lunch time on Friday.

But I think that's the chronology as far as I know. Just to, I guess, bring it a little bit further, we do not have the original letters at this point. We received—the better copies were sent by DHL Express over the weekend. They were due to arrive this morning in Boston. And because developments seem to be outpacing the speed of DHL, we spent yesterday [49] trying to find the package, and in fact, it was located, and I received the package of letters at about eight or nine last night. They were hand-delivered to Orr and Reno. And we then tried to fax them to Attorney Lukey, and we do—in fact, we did receive in that package no originals from anybody, but we got some better copies, which we did try to send and which Attorney Lukey acknowledges.

And there are some other letters, which we are having copied this morning, which are in Polish, that we didn't know of, and the first time I knew of additional letters was when Attorney Lukey contacted me on Saturday, and

I told her I would look into it, and if I found them, I'd let her know, and get them to her, and they're being copied right now.

So that's sort of the chronology of events here. In terms of the—I don't think there was any ambush. We didn't know about them. We didn't know what they said. There was nothing to ambush anybody with until noon on Friday after the direct examination of Dr. Klonoski had been completed. Certainly, if anybody had access to this information during the course of a year and a half or 18 months, 19 months of litigation, it was Dr. Klonoski having access through relatives, who, he knew who they were and where they [50] were, and we didn't. We knew a past address. We knew where she'd grown up, but we didn't have the additional information.

The father was identified, but we didn't pursue that. If anybody had access to this, they had superior access to the information. We didn't know about it. Obviously, we couldn't disclose a witness. I don't think there is a witness to disclose on the marital issue. There are letters. But obviously, we didn't know about them until the end of Thursday, and we didn't know what the contents of them were until—of the four until Friday.

And even Friday, the reason I couldn't pursue the matter with Dr. Klonoski on the stand on Friday afternoon was I only had very incomplete little bits and pieces of information about what those letters said. And they were translated over the weekend, and as soon as we had them yesterday, we provided them to Attorney Lukey. And in fact, we exchanged translations last night, and I think we had somebody stay up and compare the copies. And my perception, I looked at them this morning, where they're different, they aren't very different at all.

Now, let me move to the substance of what we're offering them for. I think we sat in court, and [51] Dr. Klonoski offered testimony on Thursday at a point where we

didn't even know if there were letters or what they said on the marriage. And a lot of testimony about the marriage through the eighties and through the nineties, there was a lot of it, and we have to be able to respond to it. And we're offering that information for three purposes.

One is impeachment and credibility. I think it's clearly relevant on those points. And I would not disagree with Attorney Lukey in terms of the fact that they're devastating.

Second, they are offered as 801(d)(2) admission by a party opponent, and these letters written by Mrs. Klonoski come in as such. She's the predecessor in interest of the estate, the main party in this case. It's relevant. They offer the testimony on the marriage. It is relevant on hedonic damages. We said long ago, last spring, when this issue first came up, that if hedonic damages and consortium were out of the case, this wasn't anything we would pursue at all. But that proposal was never accepted, so we had to pursue it. We had an obligation to our clients to pursue it.

So it's not only impeachment, but it's 801(d)(2) admission. It's relevant on hedonic [52] damages, and it's relevant on consortium. And as soon as we got it and as soon as we knew of it, we came in within two hours of knowing, having some idea what those letters said, we used them. Frankly, we—it was a quirk of fate that we got the information in time to do anything with it.

* * * *

[79] THE COURT: Sure. We'll break for lunch. Let me just put my ruling on—I'm not sure I've yet put my ruling on the record clear.

In my judgment—well, as I think about it, it's probably an inconsistent view myself, but having read these documents, the four documents you presented, it's my conclusion that—certainly to the extent that you claim anything is relevant in there, most of it is not relevant.

Material statements that are made in these documents that might be relevant that seem to portray the former plaintiff, Dr. Klonoski, in a very poor light are not relevant to the [80] issue of Mrs. Klonoski's future hedonic damages. To the extent they are relevant, or one might argue that they are relevant as a predictor or prognostication of her future happiness, I find that those statements, though relevant in that respect, would, nevertheless, be excluded. I do exclude them on grounds that their probative value is far outweighed by the risk of unfair prejudice in that those statements would tend to, in my judgment, distract the jury and confuse the jury and inflame the passions and prejudice of the jury, such that they may be at risk of focusing on the nature of Dr. Klonoski as a person in calculating a damages award for the estate, which we all agree would not be proper.

To the extent—to the limiting extent it gives a marriage view different than this—than Dr. Klonoski and others portrayed, I think they are relevant. And I think by going through the letters and allowing you to admit those portions of the letters that give that contrary view, without the inflammatory baggage of the other statements and comments in the letters, I think your interests are fairly protected.

So that's my ruling. I acknowledge that Attorney Lukey makes a very good point about late [81] discovery, not that you've violated my order of disclosure. I find that you've not. And not that you had the document in a—in a timely fashion that you could have delivered them to the plaintiffs in a meaningful timely way. I find you didn't. But she is somewhat at a prejudicial point in that there are other letters that may present a different view altogether of this.

But again, we're at the point where I think we're cumulative anyway on the item of was there discord or not discord in the marriage, and—that's not a very major

issue in the case, in any event. So here is what the potentially inconsistent part, I suppose, with respect to all of those other statements in these letters that I have not agreed to allow you to read to the jury or present to the jury. I would—I also exclude those on grounds that, to the extent they are inflammatory but fall below the line of proposing an unfair risk of substantial prejudice, outweighing their probative value, I would exclude them on the additional independent grounds that Attorney Lukey does not have the opportunity to have those other nine letters translated and examined for the possibility that they may have equally praise-worthy and laudatory comments about Dr. Klonoski in [82] them. So who knows. Maybe they would balance them off. So that's just another independent reason why I wouldn't allow the statements to be denigrating of Dr. Klonoski or certainly his relatives into evidence. All right.

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APPENDIX G

PERTINENT FEDERAL RULES

Federal Rule of Civil Procedure 26 provides in pertinent part:

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) REQUIRED DISCLOSURES; METHODS TO DISCOVER ADDITIONAL MATTER.

* * * *

(3) *Pretrial Disclosures.* In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

* * * *

(e) SUPPLEMENTATION OF DISCLOSURES AND RESPONSES. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed

by the time the party's disclosures under Rule 26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

Federal Rule of Civil Procedure 37 provides in pertinent part:

Rule 37. Failure to Make Disclosure or Cooperate in Discovery: Sanctions

* * * *

(c) FAILURE TO DISCLOSE; FALSE OR MISLEADING DISCLOSURE; REFUSAL TO ADMIT.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

* * * *

Federal Rule of Civil Procedure 52 provides in pertinent part:

Rule 52. Findings by the Court; Judgment on Partial Findings

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in subdivision (c) of this rule.